A

Ariff Arhannan bin Che Udin v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(M)-22–02 OF 2020(N) AND 05(L)-24–02 OF 2020(N)
VERNON ONG, ABDUL RAHMAN SEBLI AND ZABARIAH YUSOF FCJJ
11 MARCH 2022

C

Evidence — Conduct — Whether conduct amounted to statement — Accused was arrested for drug offences — No caution administered pursuant to s 37B(1)(b) of the Dangerous Drugs Act 1952 — Whether learned judicial commissioner erred in admitting evidence of accused's conduct which was inadmissible — Whether D *evidence of accused's conduct inadmissible because accused's conduct amounted to statement pursuant to s 37B(1)(b) of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 s 37B(1)(b)*

E *Evidence — Evidence relating to fact in issue — Relevancy — Relevancy of conduct of accused to fact in issue — Whether conduct of accused relevant under s 8(2) of the Evidence Act 1950 — Evidence Act 1950 s 8(2)*

The appellant was charged with the offence of trafficking in dangerous drugs F under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') which was punishable under s 39B(2) of the same Act. The High Court had found the appellant guilty of the charge and sentenced him to death. The appellant's appeal was dismissed by the Court of Appeal, hence, the present appeal. The appellant was also charged with the offence of in possession of dangerous drugs and was found guilty of the same, but the appellant's appeal herein was only G directed to the charge of trafficking in dangerous drugs. The appellant submitted that the learned judicial commissioner ('the JC') was wrong in admitting the evidence of the appellant's conduct of picking up the black bag containing the drug and handing it to the raiding officer ('SP6') which was H inadmissible and should have been ruled out by the learned JC notwithstanding the fact that no objection was raised to its admission. The basis for the argument was that the appellant's conduct amounted to a statement and no caution under s 37B(1)(b) of the DDA was administered by SP6 or any other police officer of or above the rank of inspector after the I appellant's arrest at the car park.

Held, dismissing the appeal, and affirming the conviction and sentence:

(1) The court agreed with Nik Hashim J (as he then was) in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* [2001] 5 MLJ 20 that to hold that the

conduct of an accused amounted to a statement under s 37A (now s 37B) of the DDA would be to overstretch the language beyond its common usage. The court also agreed with James Foong JCA (as he then was) in his dissenting judgment in *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224 that conduct could not be considered as a statement under the section that required a caution to be administered before it could be admitted in evidence. The word 'statement' in s 37B of the DDA must be confined to 'something that is stated' or 'written or oral communication' (*Bhogilal Chunilal Pandya v State of Bombay* [1959] 1 MLJ 101) and did not include conduct such as the act of the appellant in the present case of picking up the black bag containing the drug and handing it to SP6 (see paras 53–54).

(2) In the circumstances, the court was constrained to reject the appellant's contention that the learned JC was wrong in admitting the evidence of the appellant's conduct on the ground that no caution under s 37B of the DDA was administered to him. It was clear that such evidence of conduct was relevant and admissible under s 8(2) of the Evidence Act 1950 ('the EA') (see para 58).

(3) The fact in issue before the High Court was whether the appellant had knowledge of the drug inside the black bag. His conduct of picking up the black bag and handing it to SP6 was clearly relevant to the issue. The court was therefore unable to accept the appellant's argument that the prosecution could not rely on s 8(2) of the EA on the ground that there was a special Act to deal with admissibility of statements, including conduct, given by an accused person charged with an offence under the DDA, applying the *maxim generalia specialibus non derogant* (the provisions of a general statute must yield to the provisions of a special one). The argument must fall once it was determined that conduct did not amount to statement (see para 59).

[Bahasa Malaysia summary

Perayu dituduh atas kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) Akta yang sama. Mahkamah Tinggi telah mendapati perayu bersalah atas pertuduhan tersebut dan menjatuhkan hukuman mati ke atas perayu. Rayuan perayu telah ditolak oleh Mahkamah Rayuan, oleh itu, rayuan semasa. Perayu juga didakwa atas kesalahan memiliki dadah berbahaya dan didapati bersalah atas tuduhan tersebut, tetapi rayuan perayu di sini hanya ditujukan kepada pertuduhan mengedar dadah berbahaya. Perayu berhujah bahawa pesuruhjaya kehakiman yang bijaksana ('PK') telah terkhilaf apabila menerima keterangan kelakuan perayu yang mengambil beg hitam yang mengandungi dadah dan menyerahkannya kepada pegawai yang membuat serbuan ('SP6') yang mana keterangan tersebut tidak boleh diterima dan sepatutnya telah ditolak oleh PK yang bijaksana walaupun tiada bantahan

dibangkitkan terhadap penerimaan tersebut. Asas hujah tersebut adalah bahawa kelakuan perayu berjumlah kepada satu pernyataan dan tiada amaran di bawah s 37B(1)(b) ADB telah diberikan oleh SP6 atau mana-mana pegawai polis lain yang berpangkat inspektor atau yang lebih tinggi selepas penahanan perayu di tempat letak kereta.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Mahkamah bersetuju dengan Nik Hashim J (ketika itu) dalam *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* [2001] 5 MLJ 20 bahawa untuk memutuskan bahawa kelakuan seseorang tertuduh adalah sama dengan pernyataan di bawah s 37A (kini s 37B) ADB akan meregangkan bahasa melebihi penggunaan biasa. Mahkamah juga bersetuju dengan James Foong HMR (ketika itu) dalam penghakiman bertentangannya dalam *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224 bahawa kelakuan tidak boleh dianggap sebagai pernyataan di bawah seksyen yang memerlukan amaran diberikan sebelum ia boleh diterima sebagai keterangan. Perkataan 'pernyataan' dalam s 37B ADB mesti terhad kepada *something that is stated* atau *written or oral communication* (*Bhogilal Chunilal Pandya v State of Bombay* [1959] 1 MLJ 101) dan tidak termasuk kelakuan seperti perbuatan perayu dalam kes semasa mengambil beg hitam yang mengandungi dadah tersebut dan menyerahkannya kepada SP6 (lihat perenggan 53–54).

(2) Dalam keadaan tersebut, mahkamah terpaksa menolak hujahan perayu bahawa PK yang bijaksana telah terkhilaf dalam menerima keterangan kelakuan perayu atas alasan bahawa tiada amaran di bawah s 37B ADB telah diberikan kepadanya. Adalah jelas bahawa keterangan kelakuan sedemikian adalah relevan dan boleh diterima di bawah s 8(2) Akta Keterangan 1950 ('AK') (lihat perenggan 58).

(3) Fakta yang menjadi isu di Mahkamah Tinggi ialah sama ada perayu mempunyai pengetahuan tentang dadah di dalam beg hitam tersebut. Kelakuannya mengambil beg hitam tersebut dan menyerahkannya kepada SP6 jelas relevan dengan isu tersebut. Oleh itu, mahkamah tidak dapat menerima hujah perayu bahawa pihak pendakwaan tidak boleh bergantung kepada s 8(2) AK atas alasan bahawa terdapat Akta khas untuk menangani kebolehterimaan pernyataan, termasuk kelakuan, yang diberikan oleh tertuduh yang dituduh dengan kesalahan di bawah ADB, menggunakan *maxim generalia specialibus non derogant* (peruntukan statut am mesti memberi ruang kepada peruntukan statut khas). Hujah tersebut tidak boleh dipertahankan apabila telah ditentukan bahawa kelakuan tidak terjumlah kepada pernyataan (lihat perenggan 59).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Attan bin Abdul Ghani v PP [1970] 2 MLJ 143b (refd)
Bhogilal Chunilal Pandya v State of Bombay [1959] 1 MLJ 101, SC (refd)
Cohen Lorraine Philis & Anor v PP and another appeal [1989] 3 MLJ 289; [1989] 2 CLJ 956; [1989] 1 CLJ Rep 18, SC (refd)
Cormac Mccarron v Stephen Akpata; Stephen Akpata v Workcover Corp [2001] SASC 365, SC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Hendra Kozama v PP [2018] MLJU 11; [2018] 1 LNS 6, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Karam Din v Emperor AIR 1929 Lah 338 (refd)
Ngu Chee Wui v PP [2016] 6 MLJevi 190; [2015] 9 CLJ 562, CA (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
PP v Kanapathy a/l Kupusamy & Anor [2001] 5 MLJ 20; [2001] 1 CLJ 61, HC (folld)
PP v Tiong Wee Kiet [2019] 1 MLJ 634, CA (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
Raman a/l Kunjiraman v PP [2018] supp MLJ 86; [2014] 9 CLJ 915, FC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (distd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

Legislation referred to

Criminal Procedure Code ss 113, 180(4)
Dangerous Drugs Act 1952 ss 2, 6, 12(2), 37(d), (da), (da)(vi), 37B, 39A(2), 39B(1)(a)
Evidence Act 1950 ss 8(2), 27, 27(1), 157
Evidence Act [IN] ss 27, 157, 159
Prevention of Corruption Act 1961 (repealed by Anti-Corruption Act 1997) s 14
Workers Rehabilitation and Compensation Act 1986 [AU] s 120(1)(c)

Hisyam Teh Poh Teik (Kee Wai Lon with him) (Hisyam Teh) for the appellant.
Aslinda bt Hj Ahad (Nahra bt Dollah with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli FCJ (delivering judgment of the court):

[1] In the High Court of Malaya at Seremban, the appellant was charged with two offences under the Dangerous Drugs Act 1952 ('the DDA') and the charges against him were as follows:

> First Charge
>
> Bahawa kamu pada 26 Julai 2017 jam lebih kurang 2300 hrs, bertempat di rumah no. 180, Jalan Kemuning 5, Taman Kemuning, Senawang di dalam daerah Seremban, di dalam Negeri Sembilan Darul Khusus, telah didapati mengedar dadah berbahaya iaitu Cannabis seberat 721.26 gram. Dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
>
> Second Charge
>
> Bahawa kamu pada 26 Julai 2017 jam lebih kurang 2100 hrs, bertempat di tepi jalan Dataran Kemuning 1, Taman Kemuning, 70450 Senawang di dalam daerah Seremban, di dalam Negeri Sembilan Darul Khusus, ada dalam milikan kamu dadah berbahaya iaitu Cannabis seberat 29.83 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(1) Akta yang sama.

[2] He claimed trial to both charges at the conclusion of which he was found guilty of both by Muhammad Jamil Hussin JC (as he then was). For the first charge he was sentenced to death and for the second to three years imprisonment with effect from the date of his arrest. His appeal to the Court of Appeal was dismissed.

[3] At the commencement of the hearing before us, learned counsel for the appellant indicated that the appellant was only pursuing his appeal against conviction in respect of the first charge, which is the charge of trafficking under s 39B(1)(a) of the DDA. By abandoning his appeal against conviction in respect of the second charge, the appellant is deemed to accept the High Court's finding that he was in possession of the 29.83g of cannabis, the same type of drug that he was charged with in respect of the first charge.

[4] After hearing arguments by the parties on 25 October 2021, we reserved judgment to a date to be fixed. This then is our judgment. The facts are simple and straightforward. At the place and time specified in the second charge, the appellant who was driving a Perodua Myvi with registration plate number CDS 1128 had stopped at the car park. The police raiding party was already at the car park and ready for action, having carried out surveillance in the area for two hours.

[5] When the police party approached the car, the raiding officer Inspector

Mohammad Firdaus bin Ashaari (SP6) introduced himself to the appellant by showing his authority card. The appellant's reaction was one of shock and he tried to reverse his car in an attempt to escape. SP6 warned him several times that he would break the car window if he refused to cooperate. The appellant stopped and stepped out of the Myvi. A body search was conducted on him by SP6. It was here that the three plastic packets containing the 29.83g of cannabis which formed the subject matter of the second charge were found in the right pocket of his trousers.

[6] At about 10pm on the same night, SP6 carried out interrogation on the appellant. As a result of the interrogation, the appellant led SP6 to his house at No 180, Jalan Kemuning 5, Taman Kemuning, Senawang. On arrival at the house, the appellant led SP6 and his men to his room on the first floor of the house. As the door was opened, there was a strong smell of cannabis coming from inside the room.

[7] Inside the room, the appellant picked up a 'Quick Silver' black bag which was hidden among pieces of cloth and handed it to SP6. Among the items found inside the black bag were the following:

(a) various packages containing vegetable material suspected to be cannabis;

(b) a copy of a car registration document in the appellant's name;

(c) an e-pay slip in the appellant's name;

(d) a Kumpulan Wang Simpanan Pekerja (KWSP) statement in the appellant's name; and

(e) a letter of appointment in the appellant's name.

[8] A check on the bed by SP6 found a wallet containing an identification card, a driving licence and a work pass, all in the name of the appellant.

[9] The vegetable materials found inside the 'Quick Silver' black bag were sent to the chemistry department for analysis and were confirmed by the chemist Dr Vanitha Kunalan (SP4) to be cannabis weighing 721.26g. This formed the subject matter of the first charge.

[10] On these primary facts, the learned JC found, rightly in our view, that a prima facie case of trafficking had been established against the appellant in respect of the first charge. The presence of the appellant's personal documents in the black bag and in the wallet provided strong circumstantial evidence that he had knowledge of the drug. The fact that the documents and the drug were found in the same bag and the same type of drug was also found in his

possession at the time of his arrest at the car park could not have been a coincidence.

[11] Knowledge of the drug had therefore been established against the appellant by actual or affirmative evidence (as opposed to presumed knowledge under s 37(d) of the DDA), which means he was in 'possession' of the drug as the word is understood in criminal law, ie possession with guilty knowledge of the thing possessed or mens rea possession as it is sometimes called. This automatically triggered the presumption of trafficking under s 37(da)(vi) of the DDA as the weight of the drug (721.26g) exceeded the prescribed minimum by more than 500g, the minimum being 200g for cannabis.

[12] Section 37(da) of the DDA provides that any person found in possession of the prescribed minimum or more in weight of any dangerous drug otherwise than in accordance with the authority of the Act or any other written law 'shall be presumed, until the contrary is proved, to be trafficking in the said drug'. For ease of reference, we reproduce below the relevant and operative parts of the provision:

> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (da) any person found in possession of —
>
> (vi) 200 grams or more in weight of cannabis, ... otherwise than on the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[13] The statutory presumption clearly applied against the appellant as he was found in possession of the 721.26g of cannabis without lawful authority. The learned JC was therefore right in invoking the presumption of trafficking against him. As a matter of fact, he was required by law to do so as decided by this court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170. This is what Chong Siew Fai CJ (Sabah and Sarawak) said delivering the unanimous decision of the court which comprised Edgar Joseph Jr FCJ and NH Chan JCA as the other panel members:

> The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie the finding of custody or control. Such presumptions as under s 37(d) (*and for that matter, the one under s 37(da)*) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves to the contrary. Such a presumption has the compelling force of law. *It is a deduction which the law requires the trial court to make.* (Emphasis added.)

[14] The decision was followed by this court in *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121. In *Attan bin Abdul Ghani v Public Prosecutor* [1970] 2 MLJ 143b, the High Court was dealing with the presumption under s 14 of the repealed Prevention of Corruption Act 1961 which presumed that a gratification received by a public servant is deemed to have been received corruptly, 'unless the contrary is proved'. Sharma J had this to say:

> The presumption is a presumption of law and it is *obligatory* on the court to raise it in every proceeding for an offence under ss 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received. (Emphasis added.)

[15] Thus, where there is evidence, direct or circumstantial of the accused's knowledge of the drug, thereby proving 'possession', the presumption of trafficking under s 37(da) of the DDA must be invoked by the trial court as it is 'a deduction which the law requires the trial court to make'. The court has no discretion not to invoke the presumption once possession with knowledge or mens rea possession has been proved against the accused at the close of the prosecution case. By using the word 'shall' instead of 'may' and underscoring it by using the words 'until the contrary is proved', it is clear that parliament intended the presumption to be mandatory.

[16] It is wrong to say that the presumption only applies where the prosecution adduces no evidence of 'direct trafficking' and that it has no application where there is such evidence of direct trafficking, on the ground that the presumption is meant to assist the prosecution where there is no evidence of direct trafficking but not where there is such evidence. The fallacy of the argument lies in the fact that if it were so, a person who carries a large amount of dangerous drug far in excess of the prescribed minimum weight will not be subject to the presumption as his act of 'carrying' is itself an act of direct trafficking by definition (see s 2 of the DDA). So are the other acts defined as 'trafficking' by s 2. Such construction will not only defeat the object behind the provision but will render it completely otiose and bereft of all meaning, which is contrary to the trite principle that parliament does not legislate in vain.

[17] The provision is clearly intended by parliament to apply upon proof of: (a) possession of the proscribed drug; and (b) the weight of the drug is of the prescribed minimum or more. There is no other requirement or restriction. The purpose of the provision is to shift the legal burden to the accused to prove, on the balance of probabilities, that the large amount of drug in his possession was not for the purpose of trafficking. It is a rebuttable presumption.

[18] In a recent decision of this court in *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151, the Right Honourable the Chief Justice Tengku Maimun Tuan Mat chairing a seven

member bench of this court made the following pertinent observations at paras 58 to 61 in dealing with the interplay between s 180(4) of the Criminal Procedure Code ('the CPC') and s 37(da) of the DDA:

> [58] Section 180(4) of the CPC and s 37(da) of the DDA must be read harmoniously, applying the doctrine of harmonious construction. In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result and that the construction should favour coherence in the law (see *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1 at paras 78 to 79). A harmonious construction would limit 'credible evidence' to the actual finding of possession, as propounded in *Muhammed Hassan*, and once that is established successfully, it would invoke the presumption of trafficking. Defence will then be called on trafficking where the legal burden would shift to the accused to disprove trafficking.
>
> [59] Reverting to learned counsel's interpretation of the two sections respectively of the CPC and the DDA and his argument that reliance on the presumption under s 37(da) of the DDA is in breach of s 180(4) of the CPC, those arguments if acceded to, would render s 37(da) superfluous or in the words of this court in *Chew Siew Luan*, 'would result in nullifying the purport and effect' of the provisions of s 37(da) of the DDA. Further, to sustain learned counsel's argument that the learned trial judge was not entitled to find a prima facie case of trafficking by invoking the presumption of trafficking under s 37(da), would render s 37(da) otiose. Learned counsel for Abdullah indeed conceded during oral argument that his submission was in effect an attempt to convince us to do away with the presumptions regime of the DDA.
>
> [60] On a proper construction, to make out a prima facie case under s 180(4) of the CPC, credible evidence is still required for a prima facie finding of actual possession. It is then that the presumption of trafficking kicks in for the accused to disprove on a balance of probabilities that he did not traffic in the dangerous drugs. Any other construction would be against the weight of settled judicial precedent. It would also render the entire presumption regime superfluous, devoid of any utility and would effectively amount to a repeal of s 37(da) of the DDA.
>
> [61] To conclude on this issue, it is our unanimous view that having found that actual or affirmative possession of the impugned drugs by the accused had been established on credible evidence and the weight of the drugs in question exceeded the statutory limit, the learned trial judges were entitled to find that a prima facie case had been made out under s 180(4) of the CPC, by invoking the presumption of trafficking under s 37(da) of the DDA.

[19] Given the imperatives of s 37(d) and 37(da) of the DDA, there are effectively two ways in which a prima facie case of trafficking under s 39B(1)(a) of the Act can be established by the prosecution at the close of its case:

(a) by invoking the statutory presumption of trafficking under s 37(da), provided it is proved by actual or affirmative evidence that the accused was in possession of the drug. This is presumed trafficking; or

(b) by invoking the statutory presumption of possession and knowledge of the nature of the drug under s 37(d), provided it is proved that the accused had custody or control of the drug. Read with the definition of trafficking under s 2 and taking into account the amount of the drug, an inference of trafficking can be drawn. This is trafficking by inference: *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181.

[20] What the law forbids is for the court to invoke the presumption of possession under s 37(d) to further invoke the presumption of trafficking under s 37(da), as to do so would be in breach of the rule against double presumption (see *Muhammed Hassan*). What happened in *Muhammed Hassan* was that the prosecution had no proof that the appellant was knowingly in possession of the drug which was a factual prerequisite for the invocation of the presumption of trafficking under s 37(da). So the prosecution relied on 'presumed possession' under s 37(d), having proved custody and control, to invoke the presumption of trafficking under s 37(da), which this court held to be wrong as proof of 'possession' for purposes of s 37(da) must be established by actual or affirmative evidence and not by presumed possession under s 37(d).

[21] It is not wrong though for the court to invoke the two presumptions in the alternative (see *Raman a/l Kunjiraman v Public Prosecutor* [2018] supp MLJ 86; [2014] 9 CLJ 915) where it was held by this court that so long as the trial judge does not breach the rule against double presumption by using the presumption under s 37(d) to further invoke the presumption under s 37(da), it is not wrong for the court to invoke the presumption under s 37(d) in the alternative.

[22] When called upon to state his defence, the appellant chose to give evidence on oath and was his only witness. His defence, like in most drug trafficking cases, was that he had no knowledge of the drug. It was not, it will be noted, his defence that he was not trafficking in the drug, the offence which he was called upon to enter on his defence. Had he put up the defence of no trafficking, he would have to first admit that he was in possession of the drug, except that it was not for the purpose of trafficking.

[23] There is a world of difference between the accused in a drug trafficking trial saying that he had no knowledge of the existence of the drug and for him to say that he was not trafficking in the drug. For all practical purposes, the defence of no knowledge is in reality a defence that he was not even in 'possession' of the drug, let alone to be trafficking in the drug.

[24] In this regard, it bears emphasis that for the first charge the appellant was not called upon to answer a prima facie case of possession simpliciter or

simple possession such as an offence under ss 6 or 12(2) of the DDA. He was called upon to rebut or to explain a prima facie case of trafficking under s 39B(1)(a) which had been established against him at the close of the prosecution case failing which his conviction for the offence would be warranted (see s 180(4) of the CPC) which provides:

> (4) For the purposes of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which *if unrebutted or unexplained* would warrant a conviction. (Emphasis added.)

[25] The distinction is vitally important because totally different considerations apply where the court is dealing with the defence to a charge of simple possession and where the court is dealing with the defence to a charge of trafficking under s 39B(1)(a). Possession and trafficking are two distinct offences under the DDA. A person who traffics must necessarily be in possession of the drug but a person who is in possession need not necessarily be trafficking in the drug. It is not unusual for a person charged with trafficking under s 39B(1)(a) of the DDA to be acquitted of the trafficking charge but convicted of the residual and lesser offence of possession under s 12(2) read with s 39A(2).

[26] In dealing with the defence to a charge of simple possession, what the trial court has to consider invariably is whether the accused had knowledge of the drug found in his possession, ie whether he was knowingly in possession of the drug, whereas in dealing with the defence to a charge of trafficking under s 39B(1)(a), what the trial court has to consider is whether the drug found in the accused's possession was for the purpose of trafficking, regard being had to the fact that possession with guilty knowledge or mens rea possession had been established against him at the close of the prosecution case, which triggered the presumption of trafficking under s 37(da).

[27] What the appellant did in the present case was to sidestep his legal burden of rebutting the presumption of trafficking under s 37(da) by raising the defence of no knowledge, which as we said was in reality a defence that he was not even in 'possession' of the drug, and not that the drug was not for the purpose of trafficking. The defence was premised on his allegation that SP6 lied when he said that it was him who picked up the black bag containing the drug and handed it to SP6. He said it was the police raiding party who found the bag on the clothes shelf and placed it on the floor.

[28] The appellant went on to say that throughout the search he was handcuffed from behind and was standing in front of the door. In that situation, he said it was impossible for him to have picked up the black bag. He denied that the car registration document, the e-pay slip, the KWSP statement

and the work pass were found inside the black bag. He also denied that the drug found inside the black bag belonged to him.

[29] The appellant further explained that his room was not locked as it was undergoing renovation since June 2017 and that the renovation was still ongoing at the time of the police raid, suggesting no doubt that the black bag containing the drug could have been placed there by the workers who carried out the renovation works or by anyone else who had access to the unlocked room.

[30] Having considered the appellant's defence and the submissions of the parties carefully (pp 34 to 44 of the grounds of judgment), the learned JC rejected the appellant's explanation. He found the defence to be a mere denial and incapable of casting any reasonable doubt in SP6's evidence that it was the appellant who handed to him the black bag containing the drug.

[31] The learned JC made it clear in his judgment that he accepted SP6's evidence and that the police were only carrying out their job and had no motive to frame the appellant up as alleged by him. It was also his finding that the appellant failed to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. These are findings of fact which this court is loath to interfere with unless they are plainly wrong, which they are not.

[32] It has been decided by the Privy Council in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116, albeit by way of obiter that failure to rebut a statutory presumption (in this case the presumption of trafficking) will have the consequence of a conviction for the offence charged. This is what Lord Diplock said delivering the judgment of the board:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. *In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction*. (Emphasis added.)

[33] The appellant could only escape liability if he succeeded in raising a reasonable doubt in the prosecution case on any other essential element of the charge such as the nature of the drug, the weight of the drug or the identity of the drug. He could even raise a reasonable doubt on his identification. The trial court must however be mindful not to 'revisit' its earlier findings at the close of the prosecution case (see *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ

49; [2013] 9 CLJ 692) where Richard Malanjum CJ (Sabah and Sarawak) (later CJ) delivering the judgment of a five member bench of this court said at para 38:

> [38] We note that when assessing the defence the learned trial judge surprisingly *revisited* his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence. (Emphasis added.)

[34] It is axiomatic that the doubt that entitles the accused to an acquittal must not only be real and reasonable and capable of belief but must arise from the evidence or for want of evidence and not just any doubt conjured up to create a difficulty, bearing in mind every essential ingredient of the offence had been proved by credible evidence at the close of the prosecution case.

[35] In the present case, the appellant sought to cast a reasonable doubt in the prosecution case on the issue of knowledge but he failed because the learned trial judge disbelieved his claim that he had no knowledge of the drug, and he had no other defence to fall back on such as the defence of self consumption which was successfully raised by the appellant on appeal to the then Supreme Court in *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289; [1989] 2 CLJ 956; [1989] 1 CLJ Rep 18.

[36] Nor was it the appellant's case that his explanation had cast a reasonable doubt in the prosecution case on any of the other elements of the offence alluded to earlier. He must therefore be convicted of the offence charged, which is trafficking because he adduced no evidence whatsoever to discharge his legal burden of proving, on the balance of probabilities, that the large amount of drug in his possession was not for the purpose of trafficking. In the absence of such evidence, it was not open to the learned JC to make a finding that the presumption of trafficking had been rebutted.

[37] The defence of no knowledge that the appellant raised, which the learned JC rejected, was not evidence in rebuttal of the presumption of trafficking under s 37(da) of the DDA. It would be a defence to a charge of simple possession. Had the learned JC accepted the appellant's defence of no knowledge in answer to the trafficking charge, the appellant would have been entitled to an outright acquittal because without proof of knowledge of the drug, he committed no offence under the DDA, not even the offence of simple possession.

[38] Before us, learned counsel for the appellant raised the following four grounds in assailing the decision of the learned JC:

(a) the learned JC erred in law when he acted on inadmissible and prejudicial evidence to find guilt on the part of the appellant;

(b) the learned JC failed to undertake a maximum evaluation of the evidence led by the prosecution;

(c) the learned JC erred when he required the appellant to raise a reasonable doubt and to rebut the presumption; and

(d) the learned JC erred when he invoked the presumption of trafficking.

[39] Except for the first ground, which warrants greater consideration in view of the novelty of the question and the authorities cited by learned counsel, we are not persuaded that there is any merit in the other three grounds. From the grounds of judgment of the learned JC and for the reasons we have given earlier in this judgment, we are satisfied that the complaints in the three grounds have no basis either in law or on the facts.

[40] As for the first ground, the complaint was that the learned JC was wrong in admitting evidence of the appellant's conduct of picking up the black bag containing the drug and handing it to SP6. It was submitted that the evidence was inadmissible and should have been ruled out by the learned JC notwithstanding the fact that no objection was raised to its admission, citing *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 where Edgar Joseph Jr FCJ delivering the judgment of this court said at p 221 (MLJ); at p 721 (CLJ):

> Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.

[41] The basis for the argument was that the appellant's conduct amounted to a statement and no caution under s 37B of the DDA was administered by SP6 or any other police officer of or above the rank of inspector after the appellant's arrest at the car park. Section 37B of the DDA provides as follows:

> (1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of inspector or any senior officer of customs and whether or not interpreted to him by any other police officer or senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid —

(a) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having regard to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect —

It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

[42] Our attention was drawn to proviso (b) to the section. Learned counsel cited the following decisions of the Court of Appeal to support his argument: (a) *Public Prosecutor v Tiong Wee Kiet* [2019] 1 MLJ 634; (b) *Ngu Chee Wui v Public Prosecutor* [2016] 6 MLJevi 190; [2015] 9 CLJ 562; (c) *Hendra Kozama v Public Prosecutor* [2018] MLJU 11; [2018] 1 LNS 6 all of which followed the earlier decision of the same court in *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605 where it was decided (by majority) as follows:

> [44] We are of the view that the conduct of the appellant, viz, in picking up the said biscuit tin and handing it to SP4 in response to her request to hand over any prohibited item in his custody or under his control amounts to a statement which fall within the contemplation of s 37A of the Act. We do not agree with the views of Nik Hashim J as expounded in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* that the word 'statement' appearing in s 37 of the Act is 'confined to something that is stated orally or in writing'. We are of the view that the word 'statement' appearing in s 37A of the Act must be construed as including actions.

[43] James Foong JCA (as he then was) however disagreed with the majority and agreed with the prosecution that the conduct of the appellant in picking up the tin can and handing it over to SP4 could not be considered as a statement under s 37A that required a caution to be administered before it could be admitted in evidence.

[44] Reliance was also placed on this court's decision in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, which made reference to the Indian High Court case of *Karam Din v Emperor* AIR 1929

Lah 338 where the court dealt with the question of 'discovery' under s 27 of the Indian Evidence Act (I of 1872), which has its equivalent in s 27(1) of our Evidence Act 1950, which reads:

> 27 (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[45] Learned counsel relied on the following passages in *Karam Din* of which only the first three sentences were referred to by this court in *Siew Yoke Keong*:

> In connection with this it is necessary to bear in mind that the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things, namely a statement or other means employed for imparting knowledge possessed by one person to another and the knowledge so derived by the other person. It is unnecessary to enter into the question whether all means of imparting knowledge by one person to another person are or are not covered by the word 'statement' but it is necessary to emphasise the second portion, namely, that 'information' also includes the knowledge derived by the person informed from the informant. To me, therefore, it seems clear that when a person deposes simply to the following effect, namely, that from information received from the accused he proceeded to do certain things and discovered certain other things, this statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that the word 'information' includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge.

[46] We must say at the outset that counsel's reliance on *Siew Yoke Keong* is misplaced as it was a case on s 27 of the Evidence Act 1950 and not on s 37B of the DDA. Obviously different considerations apply for the application of the two provisions. The former deals with information leading to discovery of any fact given by the accused while in police custody whilst the latter deals with any statement made by the accused after his arrest.

[47] The word 'statement' in s 37B is not defined in the DDA and because of that Nik Hashim J (as he then was) in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* [2001] 5 MLJ 20; [2001] 1 CLJ 61 resorted to its dictionary meaning when dealing with s 37A of the DDA which has since been renumbered s 37B vide Act A1457 of 2014. This is what the learned judge said:

On my part, since the word 'statement' in s 37A of the Act and s 113 of the CPC has not been defined, I feel the dictionary meaning of 'something that is stated' should be given to it (see *Sarkar on Evidence* (15th Ed, 1999) at p 2279; *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106; [1990] 2 CLJ Rep 804; [1990] 2 CLJ 833 at p 107). The usage of the words such as 'is oral or in writing', 'in answer to questions', 'in the hearing of', 'interpreted', 'to say' 'to answer', 'you say' and 'shall not be bound to answer any question' in s 37A as emphasized above, clearly indicate that the word 'statement' therein is confined to something that is stated orally or in writing. To hold that the conduct of OKT1 in this case amounts to a statement under s 37A would be, in my view, to overstretch the language beyond its common usage. Therefore, I hold that OKT1's conduct in leading the police and retrieving the drugs in the room is not an answer to the question and hence it is not a statement under s 37A of the Act or under s 113 of the CPC.

[48] Beyond our shores, a similar approach was adopted by the Indian and Australian courts. In the Indian Supreme Court case of *Bhogilal Chunilal Pandya v State of Bombay* [1959] 1 MLJ 101 (SC) the appellant was charged with embezzlement of company funds and the apex court was called upon to interpret the meaning of the word 'statement' in s 157 of the Indian Evidence Act (I of 1872) which reads:

157 In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the same time when the fact took place, before any authority legally competent to investigate the fact, may be proved.

[49] It was contended by counsel for the appellant in that case that a certain document which was in writing could only be used under s 159 of the Indian Evidence Act and could not be called a statement within the meaning of s 157, for the word 'statement' used in s 157 implies that it must have been communicated to another person. This was the court's answer to the argument given by KN Wanchoo J who wrote the judgment of the court:

Now, the word 'statement' is not defined in the Act. We have, therefore, to go to the dictionary meaning of the word in order to discover what it means. Assistance may also be taken from the use of the word 'statement' in other parts of the Act to discover in what sense it has been used therein.

The primary meaning of the word 'statement' to be found in *Shorter Oxford English Dictionary* and *Webster's New World Dictionary* is 'something that is *stated*'. Another meaning that is given in the *Shorter Oxford English Dictionary* is 'written or oral communication'. There is no doubt that a statement may be made to some one in the sense of a communication. But that is not its primary meaning. Unless, therefore, there is something in s 157 or in the other provisions of the Act, which compels us to depart from the primary meaning of the word 'statement' there is no reason to hold that communication to another person is of the essence and there can be no statement within the meaning of s 157 without such communication. The word 'statement' has been used in a number of sections of the Act in its primary meaning of 'something that is *stated*' and that meaning should be given to it under

s 157 also unless there is something that cuts down that meaning for the purposes of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context.

[50] For comparison, s 157 of our Evidence Act 1950 reads as follows:

157 In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[51] In the Australian case of *Cormac Mccarron v Stephen Akpata; Stephen Akpata v Workcover Corp* [2001] SASC 365 one of the issues raised before the court was whether the word 'statement' in s 120(1)(c) of the Workers Rehabilitation and Compensation Act 1986 can be something which is not said or written. The provision reads:

(1) A person who —

...

(c) dishonestly makes a statement about a claim under this Act knowing

the statement is false or misleading ...

...

is guilty of an offence.

[52] Mullighan J of the Supreme Court of South Australia answered the question in this manner:

[53] What then is the meaning of 'statement' in this context? The most relevant *definition of 'statement'* for present purposes is to be found in the *Shorter English Oxford Dictionary* and it is 'a written or oral communication setting forth facts, arguments, demands and the like'.

[54] The definition in the *Macquarie Dictionary* is 'a communication or declaration in speech or writing setting forth facts, particulars, etc'. It may be seen that the ordinary English meaning of the word 'statement' involves speech or writing. I see no reason to construe the word in s 120(1)(c) in any other way.

[53] Having given the matter our utmost consideration and having regard to the authorities, we agree with Nik Hashim J (as he then was) in *Public Prosecutor v Kanapathy a/l Kupusamy & Anor* that to hold that the conduct of an accused amounts to a statement under s 37A (now s 37B) of the DDA would be to overstretch the language beyond its common usage. Likewise we agree with James Foong JCA (as he then was) in his dissenting judgment in *Y Jeyamuraly Yesiah* that conduct cannot be considered as a statement under the

section that required a caution to be administered before it could be admitted in evidence.

[54] The word 'statement' in s 37B of the DDA must be confined to 'something that is stated' or 'written or oral communication' (*Bhogilal Chunilal Pandya; Cormac McCarron*) and does not include conduct such as the act of the appellant in the present case of picking up the black bag containing the drug and handing it to SP6. If it were otherwise, the conduct of an accused running away from the police would also amount to a 'statement' and would be inadmissible in evidence unless he had been cautioned under s 37B of the DDA before he takes flight.

[55] In holding the view that conduct amounts to statement, it is clear that the majority in *Y Jeyamuraly Yesiah* relied on the analogy used by counsel for the appellant in that case. This is reflected in the following paragraph of the judgment:

> After referring to several authorities, learned counsel submitted that where any act of an accused communicates a fact to the officer asking the question, such conduct must necessarily amount to a statement by the accused within the meaning of s 37A of the Act. If this were not the case, then persons who cannot write, in other words, an illiterate and persons who are mute will automatically be excluded from the protection afforded by the section. This certainly cannot be what parliament had intended when the said section was drafted. The intent and purport of s 37A of the Act is to, amongst others, re-emphasize the fact that persons arrested have the right to remain silent and that they need not answer any questions after arrest.

[56] With all due respect, the analogy given by the counsel in *Y Jeyamuraly Yesiah* which the majority relied on is not only inappropriate but unintelligible. An illiterate person may not be able to read and write, but that does not mean that he cannot speak to make a statement. The same goes with a mute person. He may not be able to speak, but that does not mean that he cannot make a statement by using sign language, which is a common occurrence even in court proceedings. Even if he has no ability to communicate in sign language, there are other means for him to make a statement such as writing it on a piece of paper. The question of being excluded from the protection afforded by s 37B of the DDA does not arise at all.

[57] If counsel's reasoning in *Y Jeyamuraly Resiah* were to be carried to its logical conclusion, it would mean that an illiterate or a mute person charged with an offence under the DDA would stand in a more advantageous position than one who is not because it could then be argued that since he is incapable of making a statement due to his incapacity, his conduct which incriminates himself such as handing over to the police an incriminating item of evidence will be excluded from evidence for the reason that it cannot amount to a

'statement' by reason of his incapacity, whereas such conduct by an accused who is neither illiterate nor mute will amount to a statement. The argument cannot get more convoluted than that.

[58] In the circumstances, we are constrained to reject learned counsel's contention that the learned JC was wrong in admitting evidence of the appellant's conduct on the ground that no caution under s 37B of the DDA was administered to him. It is clear that such evidence of conduct is relevant and admissible under s 8(2) of the Evidence Act 1950 which reads:

> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[59] The fact in issue before the High Court was whether the appellant had knowledge of the drug inside the black bag. His conduct of picking up the black bag and handing it to SP6 was clearly relevant to the issue. We are therefore unable to accept learned counsel's argument that the prosecution cannot rely on s 8(2) of the Evidence Act 1950 on the ground that there is a special Act to deal with admissibility of statements, including conduct, given by an accused person charged with an offence under the DDA, applying the maxim *generalia specialibus non derogant* (the provisions of a general statute must yield to the provisions of a special one). The argument must fall once it is determined that conduct does not amount to statement.

[60] For all the reasons aforesaid, the appeal is dismissed. The conviction and sentence is affirmed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Dzulqarnain Ab Fatar